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Office of the Secretary  
Federal Communications Commission  
Washington, DC 20554

**RE: Request for an Environmental Impact Statement  
(EIS) Regarding In Band On Channel (IBOC) Radio  
Digitalization -- In FCC DOCKET MM 99-325**

Dear Commissioners and Commission Staff,

We are writing to you to request preparation of an Environmental Impact Statement (EIS) *prior to* any decision by the Commission on whether to implement In Band On Channel (IBOC) Radio Digitalization, as currently contemplated in FCC Docket MM 99-325.

Undersigned organizations are THE AMHERST ALLIANCE of Golden, Colorado; REC NETWORKS of Tempe, Arizona; ROGUE COMMUNICATION of Santa Cruz, California; VIRGINIA CENTER FOR THE PUBLIC PRESS of Richmond, Virginia; WLYC-AM of Williamsport, Pennsylvania; and CITIZENS' MEDIA CORPS/ALLSTON-BRIGHTON FREE RADIO of Allston, Massachusetts. The Amherst Alliance, a nationwide citizens' advocacy group, and Virginia Center for the Public Press are institutions which focus on advocacy of sound public policy. Rogue Communication is a research and consulting firm, specializing in mass media generally and community media in particular. WLYC-AM is a small commercial radio station, serving portions of northwestern Pennsylvania. Citizens' Media Corps/Allston-Brighton Free Radio, an aspiring Low Power FM *or* Low Power AM broadcaster, currently provides Part 15 non-commercial radio service to a small, but densely populated, portion of metropolitan Boston.

Undersigned individuals are NICKOLAUS E. LEGGETT of Reston, Virginia; JOHN ROBERT BENJAMIN of Marienville, Pennsylvania and MATTHEW HAYES of Portland, Oregon. All three individuals are concerned citizens, who regard the currently established concentrations of mass media ownership as a major threat to representative democracy, and the latter two individuals are aspiring Low Power FM broadcasters.

## **Requirements of the National Environmental Policy Act (NEPA) of 1969**

The National Environmental Policy Act (NEPA) of 1969, *42 U.S.C. 4321 et seq.*, mandates the preparation of an Environmental Impact Statement (EIS), by the appropriate governmental institution(s), prior to the initiation of *any* “major federal action” which holds the potential for “significantly affecting the quality of the human environment”.

NEPA further requires that an EIS must consider direct, indirect and *cumulative* effects, *including* ecological, aesthetic, historic, cultural, social, economic and/or health impacts.

The contemplated conversion of American radio broadcasting to In Band On Channel (IBOC) Radio Digitalization, pursuant to an FCC decision in Docket MM 99-325 (and/or any past, present or future related Docket), *easily* meets all of the statutory criteria for the requirement that an EIS must be prepared.

(a) The contemplated conversion to IBOC Digitalization would clearly constitute a *federal* action. Regardless of whether the conversion to IBOC Digitalization by affected radio stations is mandatory or optional, and regardless of whether state and local zoning laws are pre-empted or respected, the fact remains that the radio broadcasting industry’s conversion to IBOC Digitalization would be possible *only* with the approval and facilitation of the Federal Communications Commission. The role of the federal government in this process would be integral and indispensable, and therefore indisputable.

(b) The contemplated conversion to IBOC Digitalization would also constitute a *major* action. The program would be nationwide in scope, ultimately requiring the replacement of every analog radio receiver in the United States. It would also potentially affect every American county and municipality that has existing radio broadcast facilities and/or attractive sites for new radio broadcast facilities.

(c) The contemplated conversion to IBOC Digitalization would clearly have a *significant impact on the human environment*. Across the nation, at literally thousands of locations, new construction would be initiated in order to modify or replace existing radio broadcast facilities. Soil erosion, wildlife displacement and visual impacts would inevitably occur. In addition, as noted above, existing analog radio receivers would have to be replaced, in most cases before the end of their useful lives, thereby adding to current waste disposal problems -- including *toxic* waste disposal problems.

For the reasons we have stated, the FCC is undoubtedly obligated to prepare an EIS *before* it reaches any binding decision on whether to implement IBOC Digitalization, as currently contemplated in FCC Docket MM 99-325.

As noted earlier, these NEPA requirements are binding on the Federal Communications Commission *regardless* of whether conversion to IBOC Digitalization by affected radio stations is mandatory or optional -- and *regardless* of whether state and local zoning laws are pre-empted or respected. Whether the Commission adopted an optional IBOC Digitalization rulemaking that is not pre-emptive, or a mandatory, pre-emptive approach, or some option in between, there would *still* be widespread disruptions of the natural environment, and significant effects on the human environment, which would not occur *in the absence of* approval and facilitation of these *major* impacts by a *federal* institution.

We add that these NEPA requirements are also binding on the FCC *regardless* of whether an EIS is requested by an external party, such as the parties who have signed this current request. In this respect and others, NEPA is a self-implementing statute, requiring the FCC to act on its own initiative whenever the requisite criteria are met. The EIS preparation obligation applies even if no external party requests preparation of an EIS.

### **Other Relevant Legal Requirements**

We thank the National Audubon Society, and the National Audubon Society-California, for pointing out the following additional legal requirements:

(a) In addition to the mandates set forth explicitly within the language of NEPA, the FCC's *own* regulations, at 47 C.F.R. *Section 1.1307*, require the Commission to prepare an EIS whenever either of these *additional* criteria are met: (1) an endangered species might be adversely affected; and/or (2) construction of facilities in a wetlands area would be required. With thousands of facilities potentially being modified, or built, in order to accommodate a possible shift to IBOC Digitalization, the Commission can hardly assume that no endangered species and/or wetlands would be affected.

(b) Four different treaties on bird migration require that the FCC must consult with the U.S. Fish and Wildlife Service *before* making any decision which could result in higher tower elevations and, therefore, increased risk of bird collisions. The National Audubon Society-California estimates that 4 to 5 million bird collisions *already occur* in the United States every year.

We stress that these legal requirements are binding on the FCC *over and above* NEPA's *basic* statutory requirements. We also stress that these legal requirements obligate the FCC to consider impacts on the *non-human* environment, as well as the human one.

*We hereby incorporate by reference* the following documents, both of which are part of the official record for FCC Docket 97-182:

1. The Petition of the National Audubon Society for preparation of an EIS prior to any decision by the FCC on whether to adopt the proposed rule in FCC Docket 97-182. This proposed rule would allow the FCC to pre-empt state and local zoning decisions to the extent they prevent or delay the mandatory, scheduled conversion to Television Digitalization. The Petition was dated December 1, 1997 and was posted by the FCC's Electronic Comment Filing System (ECFS), on the FCC's Web Site at [www.fcc.gov](http://www.fcc.gov), on the same day.

We note that, for purposes of submitting *our own* request for preparation of an EIS, we have cautiously copied the same single-spaced letter format that was used by the National Audubon Society. (Normally, as the Commission knows, Amherst -- whether or not it files documents in tandem with other parties -- uses a double-spaced legalistic format.)

2. An *ex parte* letter, supporting the National Audubon Society's Petition for an EIS, that was filed by the National Audubon Society-California. The letter was dated April 14, 1998, and posted by the FCC's ECFS on April 17, 1998.

### **The Television Digitalization Precedent for an EIS by the FCC**

We note that the National Audubon Society's Petition for an EIS, as referenced and described above, received a *favorable response* from the FCC.

The FCC responded to the National Audubon Society in a Notice dated March 6, 1998. The FCC acknowledged the National Audubon Society's Petition for an EIS, conceded that an EIS should be prepared prior to any decision to proceed with the proposed rule in 97-182 *and then solicited public input* on what the environmental impacts of Television Digitalization might be and how they could be mitigated.

To the best of our knowledge, the Commission has never prepared an EIS for FCC Docket 97-182. On The Other Hand, to the best of our knowledge, the Commission has never issued a final rule in FCC Docket 97-182.

The Commission remains in compliance with NEPA because an EIS must be prepared *only* if the Commission is about to make a decision on whether to take action in FCC Docket 97-182. That is: By deferring further action (perhaps indefinitely) in FCC Docket 97-182, the Commission has also deferred (perhaps indefinitely) the need to prepare an EIS. Nevertheless, the Commission's apparent decision to defer action in Docket 97-182 -- coupled with its acknowledgement of EIS preparation obligations in the March 6, 1998 Notice -- sets a precedent, in the case of the planned conversion to Television Digitalization, which is naturally applicable to the currently contemplated conversion to IBOC Radio Digitalization.

We acknowledge that the Commission's decision regarding an EIS for Television Digitalization was made in the context of a proposed rule which focused on *proposed pre-emption* of state and local authority to block Television Digitalization. We contend, however, that the Commission's decision was limited to this context *only because* the National Audubon Society's request was limited to this context.

Logically, the applicability of NEPA's EIS preparation turns on whether a proposed action is federal, major and likely to significantly affect the human environment.

As for the other legal requirements we have noted above -- including treaty obligations to protect migratory birds -- their applicability turns on the factual questions of whether any endangered species are likely to be affected, whether any construction is likely to occur on wetlands and/or whether any towers will be increased in height.

*None* of these statutory and regulatory criteria reference whether or not a contemplated federal action would pre-empt any state and local laws. Further, *none* of these statutory and regulatory criteria reference whether or not corporate compliance with federal directives is optional or mandatory. Yes, the presence or absence of pre-emption might have some effect on the *scale* of possible environmental impacts -- and the presence or absence of an FCC mandate for corporate compliance might also affect the scale of the possible environmental impacts. Nevertheless, the fact remains that *any* significant impact on the human environment is enough to trigger the NEPA requirements for an EIS, and that *any* significant impact on an endangered species and/or wetlands is enough to trigger the FCC's *internal* regulatory requirements for an EIS.

Therefore, as we have emphasized previously, preparation of an EIS is required prior to *any* Commission decision to proceed with *any* form of widespread conversion to IBOC Radio Digitalization, *even if* pre-emption of state and local laws is not attempted, and *even if* corporate compliance with the IBOC Digitalization program is optional rather than mandatory. The effect of these variables can be, and should be, assessed in the EIS, as part of its study of possible environment impact mitigation measures, but these variables are not in themselves determinative of whether an EIS is required.

We add that the same legal principle applies to the treaty requirements for prior FCC consultation with the U.S. Fish and Wildlife Service. Posing as it does an inherent increase in the risk of bird collisions, which are already unacceptably high, *any* significant increase in broadcast tower height is enough to trigger the treaty requirements.

### **Scope of the IBOC Digitalization EIS**

Naturally, the exact scope of an Environmental Impact Statement cannot be firmly determined until the study itself has begun. At the very outset of EIS preparation, there are too many “unknowns” to permit rigid definition of the study’s boundaries.

With this important cautionary note in mind, we nevertheless believe that an adequate EIS, with respect to the IBOC Digitalization proposal in FCC Docket MM 99-325, would include the following investigations *at a minimum*:

(a) *Increase in Broadcast Power Levels.* What kind of increase in broadcast power levels can be expected? In what locations? With what effects, if any, on humans and/or wildlife, including endangered species? With what effects, if any, on nearby electronics equipment?

(b) *Construction To Modify Existing Facilities and/or Erect New Facilities.* What kind of soil erosion can be anticipated? What kind of access roads will have to be built and/or modified? What kind of deforestation, and/or destruction of other vegetation, will occur? What kind of visual impact will result? In what locations will these various impacts be experienced? With what effects on humans and/or wildlife, including endangered species? With what effects on wetlands? With what effects on sites of special historic, cultural and/or aesthetic value?

(c) *Increase in Tower Height.* How many towers will increase in height? With what kind of impact on local and migratory bird populations, including probable jumps in mortality due to increased risks of bird collisions? With what visual impact? In what locations will these impacts occur? With what effects on sites of special historic, cultural and/or aesthetic value?

(d) *Solid Waste Disposal.* How much otherwise avoidable and/or deferrable increase in solid waste will result from the mandatory replacement of existing analog radio equipment with newly manufactured digital radio equipment? With what effects on humans and/or wildlife, including endangered species? With what effect on wetlands? With what effect on sites of special historic, cultural and/or aesthetic value? With what fiscal effect on governmental waste disposal budgets?

(e) *Toxic Waste Disposal.* What kind of toxic chemicals, and/or other toxic wastes, will be added to the human and natural environment as a result of prematurely replaced analog radio equipment? In what quantities? With what effects on humans and/or wildlife, including endangered species? With what effects on wetlands? With what effect on sites of special historic, cultural and/or aesthetic value?

(f) *Mineral Production and Manufacturing Processes.* What kind of minerals, and other materials, will have to be produced and processed in order to meet the otherwise non-existent demand for digital radio equipment to replace prematurely retired analog radio equipment? In what quantities will these minerals and other materials have to be produced and processed? In what locations? With what kind of otherwise avoidable fuel use for transportation of the replacement equipment? With what effects on humans and/or wildlife, including endangered species? With what effects on wetlands? With what visual impact? With what effects on sites of special historic, cultural and/or aesthetic value?

We stress, again, that this is *not* an exhaustive list of the questions that must be asked, and answered, during the course of preparing an Environmental Impact Statement on IBOC Radio Digitalization. These questions should be regarded as a *starting point* for the study.

## **Consideration of Possible Mitigation Measures**

The FCC's consideration of possible environmental impact mitigation measures should naturally include various *technical options*, such as whether specific landscaping techniques should be required when and if affected companies modify existing facilities and/or build new ones. The FCC should also consider the possible differences in environmental impact as a result of alternative *policy options* for IBOC Digitalization implementation, such as whether corporate compliance should be optional or mandatory.

However, the FCC's consideration of possible environmental impact mitigation measures should extend as well to more *fundamental*, programmatic options.

That is:

The EIS should *also* assess the environmental costs and benefits of implementing the *Eureka-147 Digitalization technology*, which is used by every nation in the world that has adopted Radio Digitalization so far. Such an assessment should include a special focus on the potential contributions of Software Defined Radio, in tandem with Eureka-147.

The FCC should also investigate and evaluate *other*, newer Digitalization technologies.

We are only now beginning to see the emergence of "cutting edge" Digitalization options which may be superior, at least in some cases, to both IBOC *and* Eureka-147. These *very* new approaches to Digitalization merit careful scrutiny by the Commission.

Steven Provizer of Citizens' Media Corps/Allston-Brighton Free Radio, one of the parties to this EIS Request, has recently noted important energy efficiency advantages:

"Totally *new* Digitalization technologies are being utilized utilized in unlicensed bands. Cooperation among users, spread spectrum, ultrawideband, packet delivery, 'smart' radios -- all of these require much lower power outputs and have much lower rates of power consumption."

Less energy use, of course, automatically means less pollution.

The EIS should also assess the option of *no Digitalization at all* in the licensed bands.



**Relevance of An April 2002 Petition For Rulemaking  
On Radio Digitalization -- Currently In PRM02MB**

We note the existence of a currently un-Docketed Petition For Rulemaking regarding the exploration of technological alternatives to IBOC Digitalization. In this Petition For Rulemaking, dated April 12, 2002, THE AMHERST ALLIANCE joined 9 other parties in urging the FCC to undertake the following actions:

- (a) Full testing and evaluation of the Eureka-147 Digitalization technology
- (b) Additional research and testing of the IBOC Digitalization technology

This Petition was posted on the FCC's ECFS on April 15, in the case of FCC Docket MM 95-31, and on April 17, in the case of PRM02MB.

Later, the 10 Petitioners were joined by two new parties: ROGUE COMMUNICATION of California and KOL AMI HAVURAH of West Virginia. The FCC was informed of the new Petitioners in an Addendum, dated April 17, 2002. It was posted on the ECFS on April 18, in the case of Docket MM 95-31, and on April 26, in the case of PRM02MB.

These 2 newcomers brought the total number of Petitioners to 12:

THE AMHERST ALLIANCE, *Golden, Colorado*  
REC NETWORKS, *Tempe, Arizona*  
ROGUE COMMUNICATION, *Santa Cruz, California*  
MATTHEW HAYES, *Portland, Oregon*  
JOHN ANDERSON, *Madison, Wisconsin*  
JAMRAG MAGAZINE/GREEN HOUSE MAGAZINE, *Ferndale, Michigan*  
KOL AMI HAVURAH (Operator of WEST VIRGINIA JEWISH RADIO),  
*Benwood, West Virginia*  
VIRGINIA CENTER FOR THE PUBLIC PRESS, *Richmond, Virginia*  
NICKOLAUS E. LEGGETT, *Reston, Virginia*  
WILW RADIO, *West Hartford, Connecticut*  
WESLE ANNEMARIE DYMOKE, *Providence, Rhode Island*  
CITIZENS' MEDIA CORPS/ALLSTON-BRIGHTON FREE RADIO,  
*Allston, Massachusetts*

*We hereby incorporate by reference* this Petition For Rulemaking and all of the related documents which have been filed with the FCC, or may be filed with the FCC in the future, regarding this Petition.

### **Possible Tandem Action**

*If* the actions requested in the above-referenced Petition For Rulemaking were to be conducted on a “parallel track” with preparation of an EIS -- or even *consolidated* with the preparation of an EIS -- *then* the breadth, depth and accuracy of the IBOC Digitalization EIS would likely be enhanced significantly.

### **Conclusion**

The FCC is legally obligated to prepare an EIS, prior to making any decision on whether to implement IBOC Radio Digitalization, as currently contemplated in FCC Docket MM 99-325. This legal obligation exists *regardless* of whether or not IBOC Digitalization implementation involves attempted pre-emption of state and local zoning laws -- and *regardless* of whether corporate compliance with IBOC Digitalization is optional or mandatory.

Indeed, the legal obligation to prepare an EIS exists, in the case of IBOC Radio Digitalization, even if no external party requests an EIS.

The undersigned parties *do* request an EIS, however, prior to any decision by the FCC on whether to implement IBOC Radio Digitalization.

We also note that an April 2002 Petition For Rulemaking, which is presently un-Docketed but contained in PRM02MB, urges the Commission to initiate full testing and evaluation of the Eureka-147 Digitalization technology, and to conduct additional research and testing on the IBOC Digitalization technology, before any decision to implement IBOC Digitalization is considered. If the actions requested by this Petition For Rulemaking were undertaken on a “parallel track” with preparation of an EIS, or even *consolidated with* preparation of an EIS, the quality of the EIS would probably be improved considerably.

Respectfully submitted,

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